

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) MM Docket No. 93-48
Policies and Rules Concerning)
Children's Television Programming)
Revision of Programming Policies)
for Television Broadcast Stations)

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Notice of Proposed Rule Making

Comments

of

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Summary

The Media Institute, which filed *Comments* dated June 8, 1994 in response to the *Notice of Inquiry*, observes that the Commission, with the rules currently on the books, has already performed all that is required of it by the Children's Television Act of 1990. The Institute counsels that the Commission is not obliged to take on the constitutional risks that it would assume with its proposals to prescribe quantity standards.

These *Comments* trace the futile 25-year pursuit of a government policy that would seek to induce more and better children's TV product and suggest that the objective, because of constitutional restraint, cannot be realized.

The Media Institute calls attention to the likelihood that the proceedings have probably already been damaged by Congressional and Commission naming of approved programs and of programs, again by name, that are not suitable. The fact that the record shows broadcast licensees arranging their children's program schedules to conform to those cues emphasizes how close the process has drawn to resembling government-compelled speech.

The seeming receptivity to a quantity rule would be an abrupt reversal of a recent Commission finding that the Congress had directed otherwise. The explanation that relies on the fact that the Congress did not flatly prohibit the practice is not persuasive in view of the Commission's earlier characterization of the Congressional intent opposing a quantity rule as a "strong legislative direction."

There is no significant difference, in the view of the Institute, between a quantity rule and a processing guideline. Although technically procedural and given a kinder coloration by designating it a "safe harbor," a processing guideline is a programming quota and, therefore, objectionable.

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Comments of The Media Institute

The Media Institute, a nonprofit research foundation dedicated to free speech and to the First Amendment, here supplements its earlier *Comments* of June 8, 1994. Although the Commission's seeming readiness to take on the business of evaluating program quality is disquieting, its estimate may be correct that the Children's Television Act of 1990 is not working to bring about more and better children's TV programming. But The Media Institute is of the view that the Commission has already extracted from the Act all that the legislation allows, and that the Commission cannot legally exceed its jurisdiction with these new proposals to stiffen children's programming requirements. In a free society means count, no matter the virtue of the end. Commissioner Quello's Separate Statement has it exactly correct in its condemnation of quantitative program standards and processing guidelines as unconstitutional.

**Quarter Century Spent in Searching Out a Role
for Government to Improve Programming for
Children Demonstrates the Elusiveness of the Concept**

This is the 25th year of the Commission's search for a credible accommodation of the public interest in improved programming for

children, and the Commission is no closer now than it was then to devising a workable formula that will fit the legislative and constitutional bans on the direct involvement by government in program censorship. *Compare Children's Television Programming*, 96 FCC 2d 634, 648 (1984) (Commission decides against specific quantification rules because of constitutional concerns), *with* subject *Notice of Proposed Rule Making*, MM Docket No. 93-48, FCC 95-143 (released April 7, 1995), ¶¶ 66-73 (Commission now seems inclined to accept the constitutional risks in adopting a quantity rule).

The matter is interminable. That is the case because it involves a public good about which there is no disagreement -- everybody is for more and better children's programming. But that interest is not something that easily lends itself to imposed advancement in a society that constitutionally shelters the media from government intrusion. Nevertheless, the issue will not go away because its political appeal is unendingly attractive. Former Commissioner Glen Robinson, in his Separate Statement accompanying *Children's Programming*, 31 RR 2d 1228, 1254 (1974), neatly described the ethical conflict as follows:

There is especially seductive appeal to the idea of "protecting" children against television For this reason, regulation of children's programming raises the most subtle and the most sensitive of problems. Everyone recognizes the free speech dangers of governmental control of political broadcasting. Not enough people appreciate the far more subtle problem of governmental control when it is extended to an area like this one, where there is widespread popular sentiment supporting

some measure of governmental control. But if the First Amendment is to mean anything at all, it obviously does not mean that we can make judgments on the basis of majoritarian sentiment alone.

Simply put, it is hopeless, short of drawing up officially approved blacklists by program name, to fashion a rule that will sufficiently identify programming to advance a government requirement that the educational and informational needs of children be served. How, for example, can a rule be designed to distinguish "Fat Albert and the Cosby Kids" (already blessed as suitable by the Congress and the Commission) from "Beavis and Butt-Head" (which would surely draw something less than a passing grade from the Commission's license renewal processors)?

**This Decade's Proceedings Are Already Damaged by
Having Come Too Close to Approving Some
Programs by Name and Blacklisting Others**

Endorsing certain programs and discrediting others by name are clear examples of forbidden government conduct. Forbidden, because they come dangerously close to government-compelled speech. And, in the view of The Media Institute, the current phase of the inquiry is probably already irreversibly tainted.

To illustrate, the Commission, as indicated above, has already okayed "Fat Albert and the Cosby Kids." It has also given the green light to "CBS Schoolbreak Specials," "Winnie the Pooh and Friends," "ABC Afterschool Specials," "Saved by the Bell," "Life Goes On," "The Smurfs," "Great

Intergalactic Scientific Game Show," and "Action News for Kids" (*Notice of Inquiry*, ¶3, referring to *Report and Order*, 6 FCC Rcd 2111, ¶26 (1991)). The Commission has said nice things about "Pee Wee's Playhouse" (*Notice of Inquiry*, fn. 15), but has branded "The Flintstones" and "The Jetsons" as programs that do not measure up (*Id.*), and "Super Mario Brothers," "Slimer - The Real Ghostbusters," and "Wheel of Fortune" as questionable (Subject *Notice of Proposed Rule Making*, ¶ 18, fn. 34). Commissioner Ness, in her Separate Statement accompanying the subject *Notice of Proposed Rule Making*, dutifully affirms that (p. 2): "It is not our role to prescribe content or to force broadcasters into a common mold." But, correctness out of the way, the proceeding is next informed by the Commissioner, as follows (*Id.*): "I, for one, am not enthusiastic about sandwiching children's programming in between tabloid-style talk shows." Even more prescriptive, the Commissioner puts an official seal on "Bill Nye, The Science Guy" (*Id.*).

The Commission, of course, is probably only echoing the Congress. The *Report and Order*, in MM Docket No. 90-570, 6 FCC Rcd 2111, 2115 (released April 12, 1991) makes the point that:

The legislative history provides a wealth of examples of children's programming that is educational and informational. These include "Fat Albert and the Cosby Kids" (dealing with issues important to kids, with interruptions by host reinforcing purpose of show), "CBS Schoolbreak Specials" (original contemporary drama educating children about the conflicts and dilemmas they confront), "Winnie the Pooh and Friends" (show based on books designed to encourage reading), "ABC

Afterschool Specials" (everyday problems of youth), "Saved by the Bell" (topical problems and conflicts faced by teens), "Life Goes On" (problems of a retarded child, emphasizing prosocial values), "The Smurfs" (prosocial behavior), "Great Intergalactic Scientific Game Show" (basic scientific concepts), and "Action News for Kids" (weekly news program for and by kids). Where determinations of whether a program qualifies as "educational and informational" are in doubt, we will expect licensees to substantiate their determinations.

And then, conspicuously, the Commission volunteers that the named programs are government rubber-stamped as approved for broadcast. Thus (*Id.*):

We will rely on the guidance given in the legislative history, including the specific examples cited above, in ruling on the sufficiency of such demonstrations [of whether a program qualifies as educational and informational].

Commission Characterizes Children's Television Act as Insufficiently Precise; but Supplying Particularity by Naming Government-Approved Programs is Constitutionally Unacceptable

The Media Institute is not, with these Comments, appraising any of the programs or the program practices that the Commission seemingly has no problem holding out as government-graded. Responding to the Commission's own grumbling (*Id.* at 2) that "[t]he Act is silent ... on the meaning of key items such as 'children,' 'commercials,' or 'programs,'" the Institute, in its *Comments* of June 8, 1994, respectfully cautioned that the vagueness and constitutional infirmity of the Children's Television Act of

1990 is not curable by publishing agency lists of approved programs and practices. It is the firm position of The Media Institute that such program quality judgments, in an attempt to remedy what are probably incurable defects in the legislation, are drawing the Commission to the brink of ignoring both the no-censorship provisions of the Communications Act and of the First Amendment to the Constitution.

Broadcast Licensees Are on Record as Having Already Responded to Government Cues by Carrying and Relying on Programs Approved by the Congress and the Commission; the Practice Reinforces Constitutional Concerns about Government-Compelled Speech

In effect, these various pronouncements from the Commission declare that the values espoused in these approved programs and program practices are government-endorsed. The message will not be lost on broadcast station licensees. That likelihood, it is offered, is not hyperbole and is verifiable. To illustrate, the March 2, 1993 *Notice of Inquiry* that launched this new phase of the proceeding after a prior administration had seemed content to let the market control the process, straightforwardly makes the point that a review of renewal applications filed after passage of the Children's Television Act of 1990 showed that the programs that the Congress itself had named with approval while the legislation was being debated were *carried and relied on* by the license renewal applicants. Thus, at 8 FCC Rcd 1841, 1842:

... with few exceptions, the "educational and informational" programming broadcast appears

to be those same few programs set forth in the legislative history for illustrative purposes.

That development, in the view of The Media Institute, plagues any responsible attempt to redeem the process. Dismayingly, the Commission seems not even aware that its own recitation of the practice of its licensees to slavishly conform to the Congressional approval of "Pee Wee's Playhouse," "The Smurfs," "Winnie the Pooh," and others later also endorsed by the Commission, makes the case that The Media Institute has been contending: that the proceeding is plainly flawed because the Congress and the Commission, by virtue of various pronouncements, have already signaled that it is safe for license renewal purposes to follow the practices already sanitized by the Commission (*e.g.*, standard-length programming better than short-segment, March 1993 *Notice of Inquiry*, ¶ 8) and to broadcast the messages contained in the already named programs. And no amount of disavowal or explaining away would appear to be available to the Commission to now balance out the licensee urge to deal warily and submissively with the renewal process.

**Current Phase of Proceeding is Sharp Rejection
of Findings of Prior Administration's FCC**

This new phase of the children's programming chase that now opens the inquiry to adopting quantitative standards looms as an undisguised about-face by the Commission in pursuit of what the leadership perceives as a correct end. Less than two years after the April 12, 1991 *Report and Order*, 6

FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991), adopting current rules on children's programming to conform with the Children's Television Act of 1990, the *Notice of Inquiry*, 8 FCC Rcd 1841, was released on March 2, 1993 and evidenced a Commission readiness to consider taking on the very baggage that it had summarily rejected in its earlier *Report and Order*.

The current rules, effective in 1991, generally incorporate the language of the statute, but adopted no other guidelines as to, for example, the number of hours of educational and informational programming that stations must broadcast. (See characterization of current rules as described in subject *Notice of Proposed Rule Making*, ¶ 13.) But the Commission has found those rules are not working ("little change in available programming that addresses the needs of the child audience." *Notice of Inquiry*, released March 2, 1993, ¶16.) With this new phase, the subject *Notice* is publicly declaring an inclination to quantify the amount of children's programming that will satisfy a license renewal audit. That quantification will be accomplished either by adopting a flat rule requiring three hours of children's programming per week (increasing incrementally and with time to five hours per week) or by what would be a staff processing guideline that would pass a renewal application that measured up to the three-to-five-hour standard.

The latter proposal is referred to as a "safe harbor" refuge (presumably for broadcast licensees), but, because The Media Institute finds a distinction without much difference between a flat rule and a processing guideline, the

harbor would more likely be a safe retreat only for regulators opting to disguise an appetite for a flat rule. The Institute will later herein address the matter of the sameness of quantity rule and processing guideline, but will next review the Commission's outright rejection earlier of any authority to adopt quantitative guidelines, and will question the Commission's explanation for its abrupt and puzzling change of course.

Reversal of Position on Programming Quotas Is on Shaky Ground in View of Earlier Verdict that Commission is Under "Strong Legislative Direction" to Not Adopt Program Quotas

The Commission, as noted earlier herein, adopted its current rules to implement the Children's Television Act. *Report and Order*, 6 FCC Rcd 2111 (April 9, 1991). Those rules were reconsidered in a *Memorandum Opinion and Order*, 6 FCC Rcd 5093 (released Aug. 26, 1991). The reconsideration "reaffirms most of the decisions" of the earlier *Order*. (*Id.* at ¶2). In both documents, the Commission bluntly stated that it was not adopting any minimum amount of programming standard. It was staying away, the Commission confessed, because the Congress had directed it to not go that far. Thus, in the April 1991 *Report and Order*, at ¶24, the Commission explained that:

The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. *Given this strong legislative direction* ... We thus decline to establish any minimum programming requirement [emphasis added]

On reconsideration in August 1991, the Commission affirmed its view of its limited authority, at ¶40, as follows:

We declined to adopt minimum quantitative criteria, finding that the Act imposes no such quantitative standards, and *the legislative history indicates that none should be imposed.* [emphasis added]

In fact, the Commission's firm impression of Congressional intent was expectable given the following. The Senate committee report, CHILDREN'S TELEVISION ACT OF 1989, S. REP. NO. 227, 101st Cong., 1st Sess. 23 (1989), declares that:

The Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to have its license renewed pursuant to this section or any section of this legislation.

The House committee report, CHILDREN'S TELEVISION ACT OF 1989, H.R. REP. NO. 385, 101st Cong., 1st Sess. 17 (1989), with only minor difference, was to the same effect. Thus:

The Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review pursuant to this section or any section of this legislation.

These Congressional committee observations were, in the Commission's view in April and again in August of 1991, an order that bound the agency to

stay away from numbers of programs or numbers of hours. "Given this strong legislative direction" was the Commission's reaction to what it appeared to regard as marching orders from the Congress.

But less than two years later, on March 2, 1993, the Commission adopted the *Notice of Inquiry* that launched this current phase. The new look has developed into a total repudiation of the earlier view of the legislative direction and now declares an agency receptivity to a program quota rule or to a processing guideline. That assessment is confirmed by Commissioner Barrett's Statement accompanying the subject *Notice*, in which he announces his disagreement with the proposals to quantify programming standards and offers his opinion that: "... this *NPRM* marks a clear and substantial departure from prior Commission actions."

**Commission's Explanation for Reversal of
Position on Quantity Standards Not
Persuasive, Appears to be Defiant of Congress**

The Commission's stated explanation for reversing direction seems makeshift and vaguely defensive. Thus, the subject *Notice* refers to the Commission's taking a second look at legislative history and noting ("we note," ¶ 54) that:

... the CTA itself does not prohibit quantitative programming standards. Moreover ... the House and Senate Reports do not preclude the Commission from adopting one [a quantitative standard].

In effect, the explanation appears to come down to the failure of the Congress, in its reports and in the legislation itself, to say "absolutely."

The Commission, in the subject *Notice*, does not conceal that it had earlier viewed a quantity standard as, ¶ 54: " ... contrary to Congressional intent." Or, as otherwise stated in the *Notice* at ¶ 46:

... we decided against imposing any kind of quantitative processing guideline or standard because Congress "[did] not intend that the FCC interpret this section as requiring a quantification standard."

Respectfully, The Media Institute observes that the Commission is incompletely filling in the historical picture. The Institute reminds that the Commission in its April 1991 *Report and Order* had taken the flat-out position that it was under a "strong legislative direction" and that "the legislative history indicates that none [quantitative standards] should be imposed." August 1991 reconsideration of April 1991 *Report and Order*, ¶ 40.

With that record and having staked out that position, the Commission is on shaky ground, The Media Institute suggests, in now making excuses for defying the Congress and moving the process toward adoption of programming quotas. As contended in its June 8, 1994 *Comments*, the Institute believes that if the Children's Television Act is not working, it is neither the Commission's fault nor its obligation to go all out in order to make the Act work.

**Quantity Standards, Constitutionally Questionable,
have Historically been Rejected by the Commission
as Unworkable Because they Avoid Program Quality
and, Consequently, Cannot Achieve their Intended Objective**

The Commission has long recognized that rigid guidelines are legally suspect. *Children's Television Programming*, 96 FCC 2d 634,652 (1984). That 1984 proceeding was prominent, also, for its candid and reflective look at why a quantity standard, in light of the conflict with the statutory scheme for broadcast regulation, is unworkable and not likely to deliver on the promise of regulation. The Commission, in concluding that inquiry in 1984, confessed that "there is no logical way to disassociate quantity and quality," *Id.* at ¶ 41, and that since "the fundamental issue of program quality cannot be addressed," *Id.* at ¶ 34:

... we are not persuaded that efforts to adopt
specific mandatory program hours obligations
can achieve their intended objective in the
absence of some control over ... quality.

The 1984 rejection of a quantity standard and of a processing guideline is instructive, too, for its demonstration of the futility of the pursuit to direct licensee performance by the numbers. Thus, in that earlier era when there were fewer broadcast stations and before the explosion in alternate technologies, the Commission adverted to the "thirteen year inquiry into ... programming... addressed to children," *Id.* at ¶ 1; noted that "mandatory programming rules" and "quantitative renewal processing guidelines for children's programming" had surfaced as far back as at least 1979; and

generally waded through the history of the paper chase that the Commission ultimately found futile because, *Id.* at ¶ 43:

We thus find ourselves precisely caught between the apparent possibility of accomplishing an extremely important and socially desirable objective and the legislative and Constitutional mandate and the values on which they are based which forbid our direct involvement in program censorship and which require that broadcast station licensees retain broad discretion in the programming they broadcast.

The Media Institute urges, respectfully, that the constitutional restraints are undisturbed and obtain as forcefully today as they did in 1984 when the Commission faced the reality that it was helpless to intrude. Interveningly, the Children's Television Act of 1990 is a new feature of the regulatory landscape. But that legislation, not too long ago, was viewed by the Commission in 1991, as a "strong legislative direction" against a numbers standard and, in any event, could not override the constitutional impediment.

**Processing Guideline has Same Effect as Flat Rule;
Applying Muted Label of "Safe Harbor" Would
be Only a Tactic and Insufficient Masking of a
Strict Rule of Numbers**

The notion that a processing guideline is somehow less objectionable appears to be drawing a degree of regulatory support. On the assumption, it is supposed, that a processing guideline can be sold as theoretically procedural, the concept may have appeal as a substitute for a quantity rule. But, in the

view of The Media Institute, it is merely a tactic and cannot be sanitized by explaining it away as a "processing guideline" or "safe harbor," rather than strict regulation.

Commission practice over the last decade has been to get away from processing guidelines in program matters. In its *Notice of Proposed Rule Making* in MM Docket No. 83-670 (Revision of Programming and Commercialization Policies), 94 FCC 2d 678, 696 (1983), the Commission found that "... it is clear that [processing guidelines] have taken on substantive overtones, at least in the minds of commercial broadcasters." Since its licensees would consider a processing guideline to be the same as a flat rule, the Commission rejected processing guidelines as a "simplistic, superficial approach" which would "almost certainly encroach on the broad programming discretion enjoyed by licensees." *Id.*

The distinction between processing guidelines and quantitative standards for directing licensee compliance is faint. The Commission, as recently as the *Notice of Inquiry*, in this proceeding, released March 2, 1993, confesses (¶ 9) that "processing guidelines in the renewal area can take on the force of a rule, at least in the perception of licensees." In even stronger language, the Commission had condemned processing guidelines in its first pass at the problem after passage of the Children's Television Act. Thus, in the *Memorandum Opinion and Order*, (reconsideration of Apr. 12, 1991 *Report and Order*), released Aug. 26, 1991, 6 FCC Rcd 5093, fn. 105, the

Commission rejected a suggestion that quantitative processing guidelines would result "in less government intrusion than if no such guidelines were established." Further, the Commission observed (*Id.*):

Indeed, the very establishment of such guidelines would infringe on broadcaster discretion regarding the appropriate manner in which to meet children's educational and informational needs.

It should come as no surprise to the Commission that its licensees would conform their conduct to the processing guideline as if the guideline were mandated by regulation. With processing guidelines, the Commission essentially tells its staff to pass those applications that meet the numbers and to scrutinize those that do not. The *Notice of Inquiry*, ¶ 9, states that "failure to meet that guideline ... would determine the intensity of Commission scrutiny." The message seems clear: Those who have the numbers will pass; those who do not will be audited. The auditing process, in the experience of most licensees, would be perceived as penalty enough to coerce licensee compliance with the numbers that are the stuff of the processing guidelines. In effect, then, a processing guideline produces the same result as a flat rule of numbers; and stamping it "safe harbor" will not mask what is being accomplished.

**Commission Not Obligated to Take On
the Constitutional Risks Involved in
Program Quantity Rules**

Even if the Commission believes that it has the authority to implement a package of program percentages and approved programs, The Media Institute respectfully counsels against such a course. This suggestion flows from a view that the approach that the Commission is courting would be a regression, a backsliding from a growing enlightenment over the decades about the futility of assessing programs and the quality of programming efforts. With the rules adopted in 1991, the Commission has already performed all that the Children's Television Act requires of the agency. The Commission is not obliged, The Media Institute counsels, to take on the constitutional risks that it would assume with its proposals to prescribe quantity standards.

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